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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 807

CITY OF WEST ALLIS, VILLAGE OF WEST MILWAUKEE, and CITY OF SOUTH MILWAUKEE, all municipal corporations; ARNOLD H. KLENTZ, PHIL ELLIOTT, ERNEST J. TERRIEN, JOSEPH TABUSHING, CHESTER W. GROBSCHMIDT, and LOUIS A. LANGE,

Petitioners,

vs.

COUNTY OF MILWAUKEE, in the State of Wisconsin,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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HAMMERSMITH-KORTMEYER CO. — MILWAUKEE

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ARGUMENT

I

THE SUPREME COURT OF WISCONSIN REJECTED RESPONDENT'S ARGUMENT THAT PETITIONERS' COMPLAINT DID NOT ALLEGE SUFFICIENT FACTS TO RAISE AN ISSUE AS TO WHETHER ARTICLE IV, SECTION 23 OF THE WISCONSIN CONSTITUTION WAS VIOLATED

Respondent in its brief to the Wisconsin Supreme Court made precisely the same argument as it now presses upon this Court on page 12 of its brief. Petitioners in their brief to the Supreme Court of Wisconsin submitted

the following argument in response thereto:

> "Respondent contends that appellants have alleged no facts which would support the conclusion that it was not practicable for the Legislature to have established a more uniform system of county government. But this contention ignores the portion of appellant's complaint that in effect alleges that no inhabitant, taxable property or municipality in Milwaukee County will derive any benefit from the construction of a refuse disposal system by Milwaukee County. (See A. Ap. p. 149) If this allegation is true, the conclusion is inescapable that it would have been practicable for the Legislature to keep the system of county government completely uniform by giving no county in this state the power to construct refuse disposal systems."
>
> . . .
>
> "Respondent also complains because appellants did not allege in the Complaint that the statutory provisions in question violate Sec. 23, Art. IV of the Constitution. It is not necessary to plead legal conclusions. (See *Schofield v. Rideout,* 233 Wis. 550, 209 N.W. 155 (1940) and in instances where it is done, it is merely for the purpose of accommodation and considered surplusage."

The Wisconsin Supreme Court's opinion (see Pet. App. p. 15-19) establishes that it rejected Respondent's argument and in fact decided this issue on the merits by taking judicial notice of "facts" outside of those set forth in the pleadings. If the Supreme Court of Wisconsin had felt that Petitioners' complaint failed to allege a cause of action, all it would have had to do was say so. Significantly, it did not. The fact that in reaching its decision it took judicial notice of alleged "facts" not reflected in the pleadings, establishes that it did not decide Petitioners failed to allege a cause of action.

Thus, Respondent's argument to this Court is actually a contention that this Court should overrule the Supreme Court of Wisconsin on a matter of state law by deciding there was an "adequate state ground" for the Wisconsin Court's decision. This Court has consistently disavowed that it has this power upon certiorari. See e.g., *Scripto, Inc. v. Carson,* 344 U.S. 94, 73 S. Ct. 143 (1952).

II

RESPONDENT HAS COMPLETELY MISINTERPRETED AND MISSTATED THE DECISION OF THIS COURT IN *"CHESEBRO V. LOS ANGELES COUNTY FLOOD CONTROL DISTRICT"*

Respondent attempts to justify the Supreme Court of Wisconsin's rejection of Petitioners' allegations that no one will "benefit" from the construction of the proposed county incinerator system by claiming that this Court's decision in *Chesebro v. Los Angeles County Flood Control District,* 306 U.S. 459, 59 S. Ct. 622 (1939) "has already decided the question of due process adversely to petitioners". However, analysis of this decision in conjunction with the state court's opinion (see 11 Cal. 2d 395, 80 P. 2d 479) shows that Respondent has misstated and misinterpreted the *Chesebro* decision in several critical respects. Actually this decision fully supports Petitioners' position and constitutes nothing more than a reaffirmation of the principles spelled out in *Saunders v. Shaw,* 244 U.S. 317, 37 Sup. Ct. 638 (1917), which is discussed in Petitioners' petition on page 8.

Respondent, in describing *Chesebro* claims:

> "An action was brought by a taxpayer whose property had been included in the district [flood control], alleging that the levy of assessments under the stat-

> ute against his property were invalid because the improvements would be of no benefit to his property."

This description is false. *Chesebro* involved a state statute empowering the Board of a flood control district to acquire the works of and assume the debts of, eleven drainage districts located within its boundaries. Petitioners' primary complaint was that a state statute authorized the Board to pay for the aforesaid assumed debts by a special general tax levy on all real estate in the flood control district, without providing for a hearing as to whether land such as Petitioners' located outside the eleven drainage districts, would be benefited by the works acquired from the drainage districts (306 U.S. at 460). This Court stated:

> "Appellant does not suggest that as a matter of fact his land is not by the drainage works specially benefited or that a finding that it is so benefited would be be without foundation or arbitrary."

The primary issue in *Chesebro* was whether the state legislature had made a finding that such lands would be benefited. The holding in *Chesebro* was merely that where a landowner does not allege his real estate is not benefited by the acquisition of certain public works and the Legislature has found it is benefited, it is not a denial of Due Process for the Legislature to provide for his land to be taxed to pay for said acquisition, without affording him a hearing on the question of whether his real estate will be benefited. Hence, the critical point in *Chesebro* was that petitioners did not allege facts sufficient to constitute a cause of action, because they did not allege a lack of benefit.

This holding does not cover the present petition, where Petitioners did allege a lack of benefit and the state court

merely refused to accept the truth of these allegations and sustained a demurrer to their complaint. As this Court indicated in *Chesebro* and the cases cited therein, a finding of benefit by a legislature is conclusive on a court only if it has a reasonable, non-arbitrary basis. But, if a state court is allowed to sustain a demurrer to a complaint expressly alleging a lack of benefit, the legislature's findings then become *absolutely final.* They will stand even though completely arbitrary and contrary to the actual facts. Such a result makes a mockery out of the guarantee of Due Process.

The Wisconsin Supreme Court's decision and Respondent's complete misconstruction of the holding of this Court in *Chesebro* are cogent reasons why this Court should grant this petition. How many other state courts have been making similar decisions and how many other litigants have been similarly misconstruing *Chesebro?* Now is the time to unequivocally reaffirm those basic tenants which this Court long ago established.

Rights not periodically judicially recognized have a tendency to dissipate. This is especially true where, as here, failure of some courts and some litigants to recognize the distinction between cases such as *Chesebro* and *Shaw* is evident. Due process violations resulting from rejection of pleaded allegations upon demurrer should not be permitted to persist.

Respondent asserts that the Supreme Court of Wisconsin based its sustaining of the demurrer upon an acceptance of the "legislative finding that the County waste disposal system in Milwaukee County was 'necessary to the preservation of the public health, welfare and convenience of the County' . . ." But the "finding" referred to was made well over a decade ago and related only to

the "powers conferred by this paragraph". Petitioners did not allege the "powers" granted did not benefit the residents of the County, but rather that the *exercise* of these powers to construct a county waste disposal system will not result in any "benefit". Petitioners did not contend that the statute was unconstitutional, but rather that Respondent's exercise of the powers granted thereby was. The Legislature did not make any finding on the critical point involved in this action. Therefore, a further reason why this Court should grant this petition, is to review the same issue raised in *Chesebro,* to-wit: Whether the Legislature actually made the claimed finding of fact.

Respectfully submitted,

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